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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1001

AUTHER LARNCE KING and JAMES ALBERT KING,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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IN THE

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OCTOBER TERM, 1969

No. .....

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Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

Petitioners, Auther Larnce King, and James Albert King, pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the case of United States of America v. Auther Larnce King and James Albert King, on October 29, 1969, which affirmed the judgment and commitment of the United States District Court of Clarksdale, Mississippi.

OPINION BELOW

A copy of the United States Court of Appeals for the Fifth Circuit's opinion No. 27167 is appended hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USCA, Section 1254 (1), Rule 22 (2).

On October 29, 1969, the Court of Appeals affirmed the conviction and entered same.

No rehearing was sought by petitioners' former attorney who represented them in the trial Court and in their appeal to the United States Court of Appeals for the Fifth Circuit.

On November 28, 1969, an Order extending time to file Petition for Writ of Certiorari was entered extending the time to December 27, 1969.

Jurisdiction to review is conferred by Title 28 USCA, Section 347 and by Rule 19 (b) of this Court.

QUESTIONS PRESENTED

1. Did the Court err in charging the Jury upon the Statutory presumption of defendants' unexplained presence at the still when petitioner Authur Larnce King did not testify?

2. Did the Court err in giving the so-called "Allen Charge" as part of its original instructions?

3. Did the Court err in giving the Jury supplemental instructions on the "Allen Charge" without the Jury requesting these instructions after they had only been deliberating for one hour and a half?

CONSTITUTIONAL PROVISIONS AND STATUTES

1. **Article 3, Section 2, Clause 3.**

The trial of all crimes, except in cases of impeachment, shall be by Jury; and such trial shall be held in the state where the said crimes shall have been committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

2. **Sixth Amendment to the United States Constitution.**

Rights of the accused.—In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial Jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

3. **Fifth Amendment to the United States Constitution.**

Criminal—Provisions concerning—Due process of law and just compensation clauses.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

4. **Title 26 USCA, Sections 5601 (b) (1), (2):**

Section 5601 (b) (1), Possession;
5601 (b) (2), Failure to give bond.

STATEMENT OF THE CASE

Although the petitioner, Auther Larnce King, did not testify, the United States Attorney requested the Court to charge and the Court did charge the Jury at page 426 of the transcript that the presence of one or more of the defendants at the distillery, unless explained to their satisfaction is a circumstance from which the Jury could infer that such person was carrying on the business of a distiller without having given bond as required by law **and would be a circumstance which if the Jury saw fit they would be justified in basing a conviction.** All of which was excepted.

After the Court had instructed the Jury to which exceptions were taken, as aforesaid, the case was submitted to the Jury at 4:53 P. M. the Court had the Jury returned to the Courtroom and then again re-emphasized a version of the old "Allen Charge", saying,

> "In response to that I would like to give the Jury this additional instruction, that the Court believes and is informed and is instructed that in a large percentage of cases absolute certainty cannot be expected and, although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of his fellows, yet you should examine the questions submitted with candor and with proper regard and deference to the opinions of each other.
>
> It is your duty to decide this case on all counts if you can conscientiously do so. No juror is expected to do violence to his conscience. You should listen with the disposition to be convinced of each other's arguments. If a much larger number are for conviction a dissenting juror should consider whether his

doubt is a reasonable one which made no impression upon the minds of many men equally honest and equally intelligent with himself. If, on the other hand, a majority of you are for acquittal the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in in by the majority * * *'' (Tr. 448, 449).

After the above instructions had been given, the Jury again retired at 6:30 P. M. and after being out only five minutes returned to the Jury box at 6:35 with the following verdicts:

Guilty in Count One of the indictment which alleged a conspiracy to commit certain offenses against the laws of the United States pertaining to the illicit, unlawful, and fraudulent manufacture, possession, transportation, distribution, purchase and sale of distilled spirits.

Not Guilty as to Count Two of the indictment which charged that the defendant aided and abetted by each other and persons unknown to the grand Jury, did unlawfully have in their possession, custody and under their control an unregistered still.

Guilty as to Count Three of the indictment which charged the defendants aided and abetted by each other and persons unknown to the grand Jury, did unlawfully carry on the business of a distiller of distilled spirits without having given bond as required by law.

Guilty as to Count Four of the indictment which charged the defendants aided and abetted by each other and persons unknown to the grand Jury, did make and ferment approximately 1,250 gallons of mash fit for distillation for the production of distilled spirits on premises other than the designated premises of a distilled spirits plant lawfully qualified to produce distilled spirits.

REASONS FOR GRANTING CERTIORARI

1. The Circuit Court of Appeals has decided a Federal Question in a way in conflict with the decisions of this Court.

2. The Circuit Court of Appeals has so far departed from the accepted and usual courses of judicial proceedings as to call for an exercise of this Court's power of supervision.

ARGUMENT

In United States v. Gainey (1965), 380 U. S. 63, 13 L. Ed. 658, 85 Ct. 754, it was held, with two justices dissenting, that the presumption is valid in a prosecution for carrying on the business of a distiller.

Eight months after the above decision in **United States v. Romano**, 382 U. S. 136, 15 L. Ed. 2d 210, 86 S. Ct. 279, it was unanimously held that the presumption from presence applicable to a prosecution for possession, custody or control of an unregistered still is unconstitutional.

In the Romano case the trial Court, in instructing the Jury, read the provision of Title 26 USCA, Sections 5601 (b), 5601 (1) and 5601 (4), which provides in part that the presence of the defendant at the site of an illegal still "shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such presence to the satisfaction of the Jury".

In the instant case the Government's Special Request which the trial Court read to the Jury was as follows:

> "The presence of one or more persons at or near an unlawful unregistered distillery in operation at a time when the business of the distiller is being carried on or engaged in, unless explained to your satisfaction, is a circumstance from which you the Jury may infer that such person or persons present were carrying on the business of a distiller without having given the bond required by law".
>
> Page 426 of the transcript.

The above charge was in effect repeated twice more in the same paragraph. Thus in effect the Jury in the instant case was told in addition to a standard instruction on reasonable doubt that a defendant's presence at the still is sufficient evidence to authorize conviction. This is the reason the Romano case reversed the conviction as to the pos-

session count. This Court in the Romano case reaffirmed the limits which the Fifth and Fourteenth Amendments place upon the power of Congress to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated. Such a legislative determination would not be sustained if there was no rational connection between the fact proved and the ultimate fact presumed. Thus, judged by this standard, the Statutory Presumption was constitutionally infirm and is equally so in the instant case. Thus the Fifth Circuit in the instant case has decided a Federal question in a way in conflict with applicable decisions of this Court.

In the instant case the trial Judge in effect told the Jury they could convict on mere presence alone three times in his charge.

The Allen or dynamite charge is a direct appeal from the Court to the Jury for a verdict and was decided by this Court in 1896 and since the Jury alone determines the facts, it is high time that this Court exercise its power of supervision and make new guide lines by spelling out the limits as to the "Allen Charge." When, if ever, is this charge authorized? Does not this charge deprive the accused of the right to a trial by an impartial Jury as guaranteed by the Sixth Amendment of the Constitution? Under what circumstances would a Court be justified in giving this charge? How long should a Jury be allowed to deliberate before the Court is permitted to hint that a verdict ought to be forthcoming? How broad or how narrow should the charge be, if valid?

In the instant case the trial lasted two days and within one hour and a half from the time the Jury left the Jury box until they returned to the Jury box, which with the largest stretch of the imagination, could not have been one hour and a half of deliberation and then the Court gave the Allen Charge without any charge being requested by the Jury.

After the Court gave the additional instructions which was a version of the "Allen Charge", the Jury left the Jury box at 6:30 and returned at 6:35 which is reasonable to believe that the Jury in returning a verdict was under the impression that they were doing what they were being instructed to do.

In Green v. United States, 5 Cir. (1962), 309 F. 2d 852, 854, Judge Wisdom for a unanimous Court condemned the use of the Allen charge in virulent terms. Echoing Colorado's characterization of it as a judicial third degree. New Mexico's description as a "shotgun instruction" and the "forthright recognition by the Arizona Supreme Court, that the evils (of its right use) far outweigh the benefits * * *" and the "* * * decree that its use shall be no longer tolerated and approved * * *", this Court had equally as much to say for itself. "The Allen or 'dynamite charge' is designated to blast loose a dead-locked Jury. There is small, if any, justification for its use, * * * There is no justification whatever for its coercive use. The Jury system rests in good part on the assumption that the jurors should deliberate patiently and long, if necessary, and arrive at a verdict—if, but only if, they can do so conscientiously. It is improper for the Court to interfere with the Jury by pressuring a minority of the jurors to sacrifice their conscientious scruples for the sake of reaching agreement." 309 F. 2d 852, 854.

In the instant case the Court gave a portion of the Allen charge in its original charge and certainly there were no circumstances warranting this when the Jury hadn't even commenced its deliberations.

A portion of the Allen Charge was again given one hour and a half later and only five minutes after this supplemental charge was given to the Jury brought back a verdict convicting both defendants on three counts of the indictment. It is reasonable to believe that the Court's dynamite was effective.

CONCLUSION

Petitioners respectfully submit that the Fifth Circuit's opinion violates their rights under the Sixth Amendment to the Constitution as well as the due process clause of the Fifth Amendment of the Constitution.

Wherefore, Petitioners respectfully pray that their Petition for Writ of Certiorari be granted.

Respectfully submitted

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Attorneys for Petitioners

Certificate

I, George C. Harrison, one of the attorneys for Petitioners, Auther Larnce King and James Albert King, hereby certify that a copy of the foregoing Petition for a Writ of Certiorari was mailed postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530, attorney for Respondents, on this the 24th day of December, 1969.

.....
George C. Harrison

APPENDIX.

APPENDIX

In the
United States Court of Appeals
For the Fifth Circuit

No. 27167

United States of America
Plaintiff-Appellee

versus

Auther Larnce King and James Albert King
Defendants-Appellants

Appeal from the United States District Court for the Northern District of Mississippi

---

(October 29, 1969)

Before Brown, Chief Judge, Jones and Carswell, Circuit Judges:

Per Curiam: The appellants appeal from a sentence of the district court following their conviction for engaging in moonshine activities. Their contentions on appeal cannot be sustained. The judgment and sentence of the district court must be and it is
Affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1001

AUTHER LARNCE KING AND JAMES ALBERT KING,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1969. On November 28, 1969, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including

December 27, 1969. The petition was filed on December 26, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in instructing that a person's presence at an unregistered distillery in operation, unless explained to the jury's satisfaction, was a circumstance from which the jury might infer that such person was carrying on the business of a distiller without having given the bond required by law.

2. Whether the trial court erred in giving "Allen charge" instructions in both its original and supplemental charges.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Mississippi, petitioners were convicted of conspiracy to violate various liquor laws (Count 1); carrying on the business of a distiller without giving bond, in violation of 26 U.S.C. 5601(a)(4) (Count 3); and fermenting mash fit for distillation, in violation of 26 U.S.C. 5601(a)(7) (Count 4) (R. 465-468, 496, 497).[1] On July 25, 1968, the court imposed concurrent sentences of imprisonment for three years upon Auther Larnce King, and for four years upon James Albert King (R.

[1] Both petitioners were found not guilty on Count 2, charging possession of an unregistered still in violation of 26 U.S.C. 5601(a)(1) (R. 467-468, 496, 497).

499, 500). On appeal the convictions were summarily affirmed.

Over defense objection (R. 396-398, 431-432), the trial court gave the following instructions as part of its final charge (R. 426-427):

> Now, with respect to count three, charging a violation of Section 5601(a)(4), Title 26, United States Code that I have read to you, the presence of one or more persons at or near an unlawful unregistered distillery in operation at a time when the business of the distiller is being carried on or engaged in, unless explained to your satisfaction, is a circumstance from which you the jury may infer that such person or persons present were carrying on the business of a distiller without having given the bond required by law. You are not required to draw that inference or conclusion but you are justified by their presence near an unregistered distillery which is in operation at the time, unless explained to your satisfaction, or you are authorized in concluding or it would be a circumstance from which you may infer that such a person or persons so present were carrying on the business of a distiller without having given bond. Likewise, with respect to the count involving Section 5601(a)(4), where it is shown that a defendant or defendants are near or at the site or place where at the time when the business of a distiller or a rectifier was so engaged in or was carried on, the presence of any such defendant at such site under those conditions, unless explained to your satisfaction would authorize an inference that they were so engaged. This does not mean of course that the presence of a defendant at the site or place of

> an unregistered distillery which was in operation at the time, the business of a distiller being carried on, requires you to convict a defendant or any of them, it simply means that that would be a circumstance which if you see fit would be justified in basing a conviction.

Similarly over defense objection that they were coercive (R. 432-433), the trial court also gave the following instructions as part of its final charge (R. 430):

> It is your duty as jurors to consult with one another and to deliberate with a view of reaching an agreement if you can do this without violence to the individual judgment that you have about the evidence. Each one of you has to decide this case for yourself but you should do so only after an impartial consideration of all the evidence with your fellow jurors.
>
> In the course of your deliberations you should not hesitate to reexamine your own views and to change your opinion if you become convinced that it is erroneous but you should not surrender your honest judgment as to the weight or the effect of the evidence solely because of the opinion of your fellow jurors or for the sole purpose of bringing in a verdict.

After the case had been submitted to the jury at 4:53 p.m., the jury foreman returned at 6:25 p.m. to inquire as to what the jurors should do if they failed to agree on particular counts (R. 447-448). Then the court, over defense objection that it was again coercive (R. 450), gave the following supplementary charge (R. 448-449):

> In response to that I would like to give the jury this additional instruction, that the court believes and is informed and is instructed that in a large percentage of cases absolute certainty cannot be expected and, although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of his fellows, yet you should examine the questions submitted with candor and with proper regard and deference to the opinions of each other.
>
> It is your duty to decide this case on all counts if you can conscientiously do so. No juror is expected to do violence to his conscience. You should listen with the disposition to be convinced of each other's arguments. If a much larger number are for conviction a dissenting juror should consider whether his doubt is a reasonable one which made no impression upon the minds of many men equally honest and equally intelligent with himself. If, on the other hand, a majority of you are for acquittal the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

The jury returned its verdict of guilty on three of the four counts (see *supra*, p. 2) at 6:35 p.m. (R. 451).

ARGUMENT

1. Petitioners contend that the trial court erred in instructing the jury that a person's presence at an unregistered distillery in operation, unless explained to the jury's satisfaction, was a circumstance from

which the jury might infer that that individual was carrying on the business of a distiller without having given the bond required by law (Pet. 7-8). This instruction, however, was correctly given under this Court's decision in *United States* v. *Gainey*, 380 U.S. 63. It did not, moreover, constitute comment on the failure of petitioner Auther Larnce King to take the stand. Rather, it properly made clear that the jury was not required to convict under Count 3, charging the carrying on the business of a distillery without giving bond in violation of 26 U.S.C. 5601(a)(4), by reason of the petitioner's mere presence at the still, but that the jury could consider such presence, if unexplained, as a circumstance which might justify conviction.

In *United States* v. *Romano*, 382 U.S. 136, on which petitioner relies, the Court held invalid the statutory inference in 26 U.S.C. 5601(b)(1) relating to Section 5601(a)(1), which proscribes *possession* of an unregistered still—a statute different from Section 5601(a)(4), which prohibits the carrying on of the business of a distiller without giving bond. In the instant case, no instruction relating to the statutory inference in Section 5601(b)(1) was given, and *Romano* was thus complied with. In any event, the jury found petitioners not guilty on Count 2, charging possession of an unregistered still. There is no conflict of decisions.

2. There is no basis for petitioners' claim that the trial court erred in giving "Allen charge" instructions (based upon those approved in *Allen* v. *United States*, 164 U.S. 492) in both its original and supple-

mental charges (Pet. 8-9). The instructions given did not improperly compel the jury to reach a verdict of guilty or not guilty. Although the instructions directed the jurors to consider the viewpoints of other jurors and not to hesitate to examine their own opinions, they also made clear that the jurors should not surrender their conscientious judgments merely for the sake of reaching some verdict. The instructions here were in no way coercive. While some circuits have decided that henceforth the Allen charge should be modified,[2] no federal court that has considered the question has held that the mere giving of an Allen charge is *per se* reversible error. See *United States* v. *Meyers*, 410 F. 2d 693 (C.A. 2) certiorari denied, 396 U.S. 835; *Fulwood* v. *United States*, 369 F.2d 960 (C.A.D.C.), certiorari denied, 387 U.S. 934. There is no occasion for an exercise of this Court's supervisory power over the federal cours.

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[2] *United States* v. *Fioravanti*, 412 F. 2d 407 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837; *United States* v. *Brown*, 411 F. 2d 930 (C.A. 7), pending on petition for a writ of certiorari, No. 551 Misc., this Term.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JANUARY 1970.

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

Of Order Denying Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

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OCTOBER TERM, 1969

No. 1001

AUTHER LARNCE KING and JAMES ALBERT KING,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

Of Order Denying Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioners Auther Larnce King and James Albert King, present their Petition for a rehearing of the Court's Order dated February 24, 1970, denying the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and, in support thereof, respectfully shows:

1. That since filing their Petition for Writ of Certiorari in this Court on December 26, 1969, the Third and Ninth

Circuit Courts have rendered decisions on the Allen Charge which are substantial intervening circumstances to warrant this Court granting Petitioners Petition for Writ of Certiorari.

2. Decisions from the Fifth Circuit which were not listed in Petitioners' original Petition for Certiorari but which question the Constitutional validity of the Allen Charge are cited for the purpose of bringing to the Court's attention the necessity of formulating a definite test by which to determine impartiality.

In **United States v. Fioravanti** (1969), 412 F. 2d 407 (3rd Circuit).

Third Circuit states that in future jury trials, use of the Allen Charge will be deemed error and normally reversible error.

Although the Court refused to reverse the defendant's conviction in this case because of the ample evidence of his guilt, the Court did warn that it would not let any future verdict stand which may have been influenced in any way by an Allen Charge.

In **Sullivan v. United States** (1969), 414 F. 2d 714 (9th Circuit).

Ninth Circuit doubts that it is really any longer advisable to give the Allen instruction at all, and it certainly should be given only when it is apparent to the District Judge from the Jury's conduct or the length of its deliberations that it is clearly warranted.

The Fifth Circuit in a Number of Recent Decisions Has Questioned the Constitutional Validity of Such a Charge as the Allen Charge

In **Thaggard v. United States**, 354 F. 2d 735, 739 (5th Circuit 1965), cert. denied 383 U. S. 958 (1966).

Judge Coleman, in a critical concurring opinion, attacked the Allen Charge as violating the right of the accused to a trial by an impartial Jury.

In **Huffman v. United States**, 297 F. 2d 754, 755 (5th Circuit 1962), cert. denied, 370 U. S. 955 (1962).

Judge Brown in a dissenting opinion, condemned an Allen type instruction as violating the Constitutional ideal of a fair and independent Jury.

CONCLUSION

The Sixth Amendment guarantees the accused the right to a public trial by an impartial Jury in all criminal prosecutions. However, the Allen Charge asks a dissenting Juror to consider his position because the majority takes an opposite view. The Allen Charge not only urges that a Juror reconsider his stand in view of the majority's position, but directs the dissenters to recognize that a majority is adverse to him, and he should allow this to influence his decision. A view of this type is contrary to the theory that a defendant is to be convicted only if each Juror believes that he has been proven guilty beyond a reasonable doubt. The Allen Charge has the effect of lowering the standard of proof required for establishing reasonable doubt to what the majority considers sufficient rather than what all twelve Jurors thought would be sufficient.

One of the characteristics of the Jury system is the possibility of a hung Jury and the Allen Charge is an evil which the Supreme Court should correct.

This Court since given its approval to the instructions in Allen v. United States in 1896 has had numerous opportunities to reconsider its position but has refused to do so by either refusing to hear the cases or has gotten around it by deciding the cases on other grounds.

Justice Clark once stated that there is no place in our system for such an instruction and that "Allen is dead law", so let us bury it.

Petitioners pray that the Court will take this opportunity to formulate a definite test by which to determine impartiality and determine whether the Allen Charge violates the Constitutional standard of impartiality.

For the foregoing reasons it is respectfully urged that this Petition for a rehearing be granted, and that, upon further consideration, a Writ of Certiorari issue to the United States Court of Appeals for the Fifth Circuit.

Dated March 11th, 1970.

Respectfully submitted

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Attorneys for Petitioners

Certificate of Counsel

I, Warner Hodges, one of the attorneys for the above named petitioners do hereby certify that the foregoing Petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

Dated: March 11th, 1970.

.....
Warner Hodges

Certificate of Service

I, George C. Harrison, one of the attorneys for Petitioners, Auther Larnce King and James Albert King, hereby certify that a copy of the foregoing Petition for Rehearing of Order Denying Petition for Writ of Certiorari was mailed postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530, attorney for Respondents, on this the 11th day of March, 1970.

.....

George C. Harrison